Supreme Court, U.S.
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In the Supreme Court of the United States

BRAD LIEBERMAN, PETITIONER

v.

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the post–incarceration civil commitment of a convicted sex offender under a state civil commitment statute violate the former offender's rights under the Due Process Clause of the Fourteenth Amendment, when he presented undisputed evidence that at the time of his civil commitment, he possessed full volitional control over his behavior?

PARTIES TO THE PROCEEDINGS

Brad Lieberman is the Petitioner, and the People of the State of Illinois is the Respondent. There are no other parties.

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INTRODUCTION

This Court has held that civil commitment of a convicted sex offender after imprisonment ends is not permitted in the absence of substantial, competent proof that the offender presently suffers from "serious difficulty in controlling behavior." *Kansas* v. *Crane*, 534 U.S. 407, 412–13 (2002); *see also Kansas* v. *Hendricks*, 521 U.S. 346, 357–58 (1997). Neither a predisposition to violence nor "dangerousness" is enough to support commitment. *Hendricks*, 521 U.S. at 357–58.

In *Hendricks* and *Crane*, this Court "underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment." *Crane*, 534 U.S. at 412, (quoting *Hendricks*, 521 U.S. at 360, 372–73). Substantial proof of "serious difficulty in controlling behavior" supplies the constitutional linchpin. Therefore, commitment of a "dangerous sexual offender . . . without *any* lack–of–control determination" cannot be justified. *Crane*, 534 U.S. at 412 (emphasis in original).

For offenders in Illinois, however, the state courts have cast doubt on those well established propositions. The record here—including a wealth of undisputed expert testimony—makes clear that the Petitioner possessed full volitional control at the time of his commitment trial. That evidence affirmatively

contradicted the requirements of *Crane*. But the courts below refused even to consider that evidence or to analyze the fundamental constitutional issue it presented under this Court's cases.

The question presented here is not limited to the facts of Petitioner's case. The issue will affect hundreds, if not thousands, of civil commitment cases across the country, because, as this Court ominously predicted, civil commitment statutes have become "a mechanism for retribution," a routine stage in the post–conviction process for sex offenders. *Crane*, 534 U.S. at 412. The political and emotional appeal that accompanies the civil prosecution of sex offenders threatens to eviscerate constitutional requirements that should be carefully observed in each case.

The Illinois appellate court's opinion here shows clearly how, in practice, post–incarceration civil commitment has moved away from *Hendricks* and *Crane* as it has become an adjunct to the criminal process. Petitioner's volitional control was the central issue raised in the appeal below. Yet, the appellate court's opinion refused to acknowledge the constitutional issue and downplayed the importance of the unequivocal. Most tellingly, the appellate court's opinion never even cited *Hendricks* or *Crane*.

The Illinois appellate court's silence about the constitutional limits on civil commitment of sex offenders is tantamount to a proclamation that the limits set by *Hendricks* and *Crane* need not be observed in Illinois. This Court's intervention is warranted to reaffirm *Hendricks* and *Crane* and protect the civil liberties of individuals who have already been punished for their crimes.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is cited as *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 884 N.E.2d 160, 318 Ill. Dec. 605 (1st. Dist. 2007) (reprinted at App. 1a–44a).

JURISDICTION

The order of the Supreme Court of Illinois denying Petitioner's petition to appeal as a matter of right and, alternatively, for leave to appeal, was entered on September 24, 2008. The judgment and order of the Appellate Court of Illinois, First Judicial District, entered September 28, 2007, is therefore the final judgment rendered by the highest court of Illinois in which a decision could be had. It is the judgment sought to be reviewed here. The statute conferring jurisdiction on this Court is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment of the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1.

STATEMENT OF THE CASE

After a jury trial, Petitioner Brad Lieberman ("Lieberman" or "Petitioner") was adjudged a sexually violent person under the Illinois Sexually Violent Persons Commitment Act ("SVPCA") by an order entered February 16, 2006. At the jury trial, the State called only two witnesses. Both were clinical psychologists who testified as experts about

Petitioner's psychological status. (Tr. Vol. 4 at 41–42; Tr. Vol. 9 at 27).

The key testimony involved Petitioner's current ability to control his behavior. Dr. Jacqueline Buck testified that Petitioner possesses full volitional control and capacity, i.e., the ability to choose whether he will act on any urges he may experience. (Tr. Vol. 7 at 104). Her testimony was unequivocal: "Q. Brad had volitional control because he is not mentally ill, is that true? A. You bet. That's true." *Ibid.*

Dr. Buck made a clear distinction between lack of control and predisposition. She testified that Petitioner's mental disorders "warp his perceptions and his feelings and allow him to exhibit sexually assaulting behavior," but they are not related to the control of his behavior. (Tr. Vol. 7 at 103). The two concepts, predisposition and control, cannot be lumped together—it would be "mixing apples and oranges." (*Id.* at 104). Petitioner's mental disorders may have predisposed him to commit acts of sexual violence, but they do not reduce his ability or capacity to control his behavior. (*Id.* at 104, 105, 107, 109–10).

Dr. Buck's testimony was not focused on Petitioner's volitional control at the time he committed the crimes more than twenty–five years ago. Rather, Dr. Buck expressed the opinion at trial that Petitioner possesses full volitional control *now*. She explained that people who lack volitional control are "significantly mentally ill . . . ." "[T]hey are disturbed, schizophrenics, manic depressives who are not taking medication and are usually in a psychiatric hospital." (*Id.* at 108). "But clearly, Mr.

Lieberman is not mentally ill. He does not suffer from any of the . . . [psychiatric diagnoses] . . . which would lend themselves to . . . that determination." (*Id.* at 109). "All of his behavior over the past well–documented 26 years screams he has volitional control, volitional capacity. There is no doubt about that." (*Id.* at 109–10). Again, she testified: "Q. He has volitional capacity? A. Yes, and control. Q. And control? A. To do what he wants." (*Id.* at 110).

Dr. Buck could not measure Petitioner's level of volitional control or capacity, but she had no doubt he presently possesses full control and capacity. (*Id.* at 107–08). In her opinion, behavior is the only way to judge volitional control. Petitioner's past and present behavior is completely consistent with full volitional control. (*Id.* at 108–09).

The State's other expert witness, Dr. Barry Leavitt, did not contradict Dr. Buck on the issue of volitional control, nor did he provide any additional information about it. (Tr. Vol. 16 at 17–18; Tr. Vol. 7 at 102–10). He agreed that "under certain circumstances . . . [Petitioner] is capable of controlling his behavior." (Tr. Vol. 16 at 18). Dr. Leavitt offered the bare conclusion that Petitioner's mental disorders "affect" volitional control: "Q. ... [D]oes his mental disorder affect his emotional or volitional control? A. Clearly it does." (*Id.* at 19). Like Dr. Buck, Dr. Leavitt never testified that Petitioner lacked control or that he had any serious difficulty in controlling his behavior. He admitted that: "[I]n most situations in the last 26 years he's able to control his impulses." (*Id.* at 18–19; Tr. Vol. 9 at 174). "Q. He's able to control his impulses? A. That is correct." (Tr. Vol. 9 at 175).

FEDERAL QUESTION RAISED BELOW

The federal question presented is whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and the Supreme Court decisions in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), and *Kansas* v. *Crane*, 534 U.S. 407 (2002), permit post–incarceration civil commitment of a convicted sex offender when the uncontroverted evidence in the record shows that Petitioner does not currently lack volitional control over his behavior.

This federal question was first presented to the Circuit Court of Cook County in Petitioner's motion for directed verdict on February 7, 2006. Motion for Directed Verdict, 3–5. There, Petitioner argued that he could not be civilly detained absent a finding of lack of volitional control in light of U.S. Supreme Court precedent. *Ibid.* The trial court judge orally denied Petitioner's motion. App. 51a–52a. Petitioner again raised this federal question to the circuit court in his post–trial motion on April 7, 2006. Post–Trial Motion, 3, 6–7. The motion was denied without comment on April 10, 2006. App. 49a–50a.

On appeal, Petitioner presented this federal question to the Appellate Court of Illinois, First District, in his brief filed November 21, 2006. App. 103a–108a. Petitioner argued that, according to the Supreme Court decisions in *Hendricks* and *Crane*, due process requires "proof of serious difficulty in controlling behavior." *Ibid.* The federal question was also raised in Petitioner's reply brief. Reply Brief 1–2. The Appellate Court did not address the federal question in its published opinion, issued September 28, 2007. App. 1a–44a. Petitioner filed a petition for rehearing on October 19, 2007, which was denied on March 20, 2008. App. 47a–48a.

The federal question was raised in the Supreme Court of Illinois in a petition for leave to appeal filed on April 22, 2008. App. 98a–102a. Petitioner argued that the Due Process Clause of the United States Constitution does not permit commitment where the uncontroverted evidence in the record shows that Petitioner does not currently lack volitional control over his behavior. *Ibid.* The Supreme Court of Illinois denied the petition for leave to appeal without comment on September 24, 2008. App. 46a.

REASONS FOR GRANTING THE PETITION

Two recent trends have undercut the importance of due process safeguards in state civil commitment proceedings, necessitating this Court's review of Petitioner's case. First, public awareness of these emotionally charged cases is on the rise, leading to political and popular pressure to commit *all* convicted sex offenders after they serve their prison sentences. And second, courts construing state statutes in light of *Hendricks* and *Crane* have subordinated the constitutional requirements announced in those cases to imprecise statutory language that often misses the constitutional mark.

Petitioner's case is emblematic of both trends. The decision below shows the ease with which prosecutors and courts can casually ignore controlling federal precedent in their zealous efforts to continue the confinement of convicted sex offenders after their prison sentences have been served. This case presents the Court with the opportunity to clarify once again that even the unpopular among us have constitutional rights, and those rights must be respected in civil commitment proceedings.

I. Civil Commitment Statutes Have Become A Form Of Vigilante Justice, Fueled By A Popular Perception That Criminal Punishment Of Sex Offenders Is Not Sufficient.

Vigilante justice is typified by a disregard for due process in the face of a perception that criminal punishment is insufficient to punish a crime. Since the *Hendricks* decision in 1997 and the *Crane* decision in 2002, prosecutors in many states have acted like vigilance committees to enforce nominally civil commitment statutes that permit indefinite post–prison confinement of convicted sex offenders. The New York Times reported that, as of March 2007, approximately 2700 convicted sex offenders were being held well past their prison terms under civil commitment programs in 19 states. *See* Monica Davey and Abby Goodnough, *Doubts Rise As States Hold Sex Offenders After Prison,* N.Y. TIMES, March 4, 2007 *available at* http://www.nytimes.com/2007/03/04/us/04civil.html. Few of the committed sex offenders have been released. *Ibid.* The *Times* reporters commented that the laws are "proven and potent vote–getters that have withstood constitutional challenges." *Ibid.* They described the commitment trials as "contentious duels between psychologists over how best to analyze an offender's history and likelihood of repeating crimes." *Ibid.* They further noted that politics and emotion weigh heavily in the outcome of the cases, with elected judges and juries inescapably affected by the "raw facts of someone's offense history or the public spectacle over their crimes." *Ibid.*

The Illinois Attorney General has filed 422 cases under the Illinois SVPCA since the law took effect in

1998. *See* Mary Schenk, *Price of Justice High In Determining Sexually Violent Offenders*, THE NEWS–GAZETTE, December 14, 2008 *available at* http://www.news-gazette.com/news/2008/12/14/price_of_justice_high_in_determining_sexually_violent_offenders (reciting Illinois Attorney General statistics). To date, 230 respondents have been committed in Illinois, and another 151 are awaiting trial. Only 22 cases have been dismissed; 19 respondents have been conditionally released.

These statistics demonstrate the increasing public and judicial reliance on civil commitment statutes to keep sex offenders confined indefinitely. The juries to whom the commitment decisions are entrusted cannot—and are not instructed to—separate civil commitment issues from constitutionally improper punishment for past crimes. Further, ambiguous and vague psychological jargon compounds the difficulty for each court or jury, preventing them from making a meaningful distinction between the "dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment [and] the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413.

In sum, the constitutional analysis required by *Hendricks* and *Crane* has become mired in a mix of politics, emotion, confusing expert testimony, and painstaking repetition of the details of past crimes. The new popularity of commitment statutes makes it all the more important that they be enforced with genuine concern for the fundamental principles of due process upon which their existence depends. U.S. CONST. amend. XIV §1. Accordingly, review by this Court is urgently needed now.

II. Poorly Drafted State Statutes Have Further Diluted Principles Of Due Process.

The second trend that has undercut the constitutional requirements for civil commitment of convicted sex offenders results from the need for state courts to construe statutes that were enacted before *Crane*. In many cases, the issue has been presented, as it was in *State* v. *White*, 29 Fla. L. Weekly S821, 891 So. 2d 502, 503 (Fla. 2004), as follows: "Whether [*Crane*] imposed an additional, extra statutory but constitutionally required element necessary to commit a respondent . . . about which the jury must be instructed: namely, that the respondent has serious difficulty controlling behavior."

In *White*, the Florida Supreme Court held that *Crane* did not impose an additional requirement. The court noted that the Florida statute "did not state the standard in terms of whether respondent has serious difficulty controlling behavior, [but] it accomplishes the same result." *Id.* at 509. The court went on to predict that a respondent who fits the statutory description "necessarily will have difficulty controlling his behavior." *Id.* at 510.

That same logic—the assumption that when the state statute is narrowly tailored, the constitutional requirements of *Hendricks* and *Crane* will "necessarily" be met—has been followed by numerous courts, with the nearly unanimous result that the commitment order is upheld. *See In re Commitment of Burgess*, 262 Wis. 2d 354, 376–77, 665 N.W.2d 124, 135 (Wis. 2003) (expert's prediction that respondent could, but would not, control his behavior was sufficient proof under state statutory

language); *In re Detention of Thorell*, 149 Wash. 2d 724, 736, 72 P.3d 708, 715–16 (Wash. 2003) (statute requires "some proof" that the "mental abnormality has an impact on offenders' ability to control their behavior"; proof of a "link" between a mental abnormality and past sexually predatory behavior is sufficient); *In re Leon G.*, 204 Ariz. 15, 22, 59 P.3d 779, 786 (Ariz. 2002) (statute "substantially and adequately narrow[ed] the class of individuals subject to involuntary civil commitment"); *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 143, 568 S.E.2d 338 (S.C. 2002) (court may make a lack of control determination from the totality of the evidence). The Illinois statute itself was upheld by *In re Detention of Varner*, 207 Ill. 2d 425, 800 N.E.2d 794 (Ill. 2003)—which the appellate court cited in this case in one of its only references to constitutional limitations. The *Varner* court upheld the facial validity of the SVPCA based on its conclusion that the Act's definitions "supply the constitutionally required elements for civil commitment, . . ." App. 27a (quoting *Varner*, 207 Ill. 2d at 432–33, 800 N.E.2d at 798–99).

While it may be possible—or even likely—that a commitment order under a narrowly tailored state statute will satisfy the constitutional requirements, focusing on the state statute by itself is not sufficient to ensure constitutional protections in every case. State courts must also be willing to consider the constitutional issues independently, determining whether the evidence in the record comports with the due process protections recognized in *Hendricks* and *Crane*. The instant case is but one egregious example of a commitment order for a former offender for whom *there is no proof at all* of a serious difficulty

with behavioral control. For this reason as well, Supreme Court review is warranted.

CONCLUSION

By ignoring *Hendricks* and *Crane* entirely and treating the issue as one of state law, the Illinois appellate court invites other courts to eliminate the federal constitutional requirement that convicted offenders must be proven by substantial evidence to have serious difficulty controlling their behavior before civil commitment can be ordered. This case thus exemplifies the emerging conflict between how commitment proceeding work in practice and how they should work under *Hendricks, Crane* and the Fourteenth Amendment. For all of these reasons, this Court should grant the Petition and reaffirm or clarify the constitutional requirements for civil commitment.

Respectfully submitted.

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